

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

JANUARY TERM, 1901.

No. 1035.

51

BROOKE MACKALL, APPELLANT,

vs.

WILLIAM ROY MITCHELL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED DECEMBER 14, 1900.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1901.

No. 1035.

BROOKE MACKALL, APPELLANT,

v.s.

WILLIAM ROY MITCHELL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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Original. Print.

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In the Court of Appeals of the District of Columbia.

BROOKE MACKALL, Appellant, }
vs. } No. 1035.
WILLIAM ROY MITCHELL. }

a Supreme Court of the District of Columbia.

BROOKE MACKALL }
vs. } No. 40736. At Law.
WILLIAM ROY MITCHELL. }

UNITED STATES OF AMERICA, } ss :
District of Columbia, }

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 Declaration.

Filed January 29, 1897.

In the Supreme Court of the District of Columbia.

BROOKE MACKALL, Plaintiff, }
vs. } Law. No. 40736.
WILLIAM ROY MITCHELL, Defendant. }

The plaintiff sues the defendant to recover possession of that portion of lot numbered seven (7), in square numbered two hundred and twenty-three (223), in the city of Washington, District of Columbia, contained within the following metes and bounds, namely: Beginning at a point on the south side of New York avenue nine and ninety-hundredths (9.90) feet from the northeast corner of the said square, and running thence northeasterly with the said New York avenue nine and ninety-hundredths (9.90) feet to the said northeastern corner of the said square; thence with the line of Fourteenth street west, in said city, eleven feet, and thence in a straight line eleven and forty-two hundredths (11.42) feet to the place of beginning, together with all the improvements thereon and the privileges and appurtenances thereto belonging, in which the plaintiff claims an estate in fee-simple, and of which he was lawfully seized and possessed on, to wit, the 1st day of June, A. D. 1896, when the defendant entered the same and unlawfully ejected the plaintiff therefrom, and

from thence hitherto has detained and still detains the same unlawfully and forcibly from the plaintiff; and the plaintiff claims of the defendant and of all persons, his tenants or agents, the possession of the said premises, improvements, and appurtenances and all intervening damages and costs and reasonable intervening rent for the said premises, which the plaintiff estimates at one thousand dollars (\$1,000), besides costs of this suit.

HENRY E. DAVIS,
Attorney for the Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

HENRY E. DAVIS,
Attorney for the Plaintiff.

Defendant's Plea.

Filed February 23, 1897.

In the Supreme Court of the District of Columbia.

BROOKE MACKALL, Plaintiff,	} At Law. No. 40736.
vs.	
WILLIAM ROY MITCHELL, Defendant.	

3 Comes now the defendant, and for a plea to the plaintiff's declaration says that he is not guilty as alleged.

ENOCH TOTTEN,
W. C. PRENTISS,
Attorneys for Defendant.

Joinder of Issue.

Filed March 12, 1897.

In the Supreme Court of the District of Columbia.

BROOKE MACKALL	} Law. No. 40736.
vs.	
WILLIAM R. MITCHELL.	

The plaintiff joins issue upon the defendant's plea.

HENRY E. DAVIS,
Attorney for the Plaintiff.

4

Notice of Trial.

Filed March 12, 1897.

In the Supreme Court of the District of Columbia.

BROOKE MACKALL, Plaintiff,

vs.

WILLIAM ROY MITCHELL, Defendant.

} At Law. No. 40736.

Take notice that the issue joined in this case will be tried at the next term of this court.

HENRY E. DAVIS,
Attorney for the Plaintiff.

To Messrs. Enoch Totten & W. C. Prentiss, attorneys for the defendant.

5

Note of Issue.

Filed March 12, 1897.

In the Supreme Court of the District of Columbia.

BROOKE MACKALL, Plaintiff,

vs.

WILLIAM ROY MITCHELL, Defendant.

} Law. No. 40736.

Attorney for the plaintiff, Henry E. Davis.

Attorney for the defendant, Enoch Totten.

Last pleading filed February 23, 1887.

HENRY E. DAVIS,
Attorney for the Plaintiff.

Memorandum.

June 7, 1900.—Verdict for defendant.

Memoranda.

June 29.—Motion for new trial submitted.

Sept. 26.—Term prolonged 38 days to settle bill of exceptions and dispose of motion for new trial.

6

FRIDAY, October 12, 1900.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * *

The following cases were tried before Justice Cole:

BROOKE MACKALL, Plaintiff,

vs.

WILLIAM ROY MITCHELL, Defendant.

} At Law. No. 40736.

After consideration of the plaintiff's motion for a new trial heretofore submitted to the court, it is considered that the same be, and

hereby is, overruled and judgment on verdict ordered. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff his costs of defense, to be taxed by the clerk, and have execution thereof. The plaintiff notes an appeal to the Court of Appeals, and the penalty of the bond is fixed at one hundred dollars.

Memorandum.

October 24, 1900.—Appeal bond filed.

Memorandum.

November 9, 1900.—Bill of exceptions submitted.

April term, 1900, stands adjourned without day, except as heretofore ordered.

* * * * *

Supreme Court of the District of Columbia.

NOVEMBER 23, 1900.

BROOKE MACKALL, Plaintiff,	} At Law. No. 40736.
<i>vs.</i>	
WILLIAM R. MITCHELL, Defendant.	

Now again comes here the plaintiff, by his attorney, and prays the court to sign the bill of exceptions heretofore submitted for its consideration, taken during the trial of this cause; which bill of exceptions is signed, sealed, and made part of the record now for then.

Bill of Exceptions.

Filed November 23, 1900.

In the Supreme Court of the District of Columbia.

BROOKE MACKALL	} At Law. No. 40736.
<i>vs.</i>	
WILLIAM R. MITCHELL.	

Be it remembered at the trial of this cause the plaintiff, in order to maintain the issues on his part joined, offered in evidence the land records of the United States and District of Columbia affecting the title of lot 7, in square 223.

First. Original book in the custody of the War Department showing the allotments of the several lots and squares between the United States and the original proprietors of the said book, showing that lot seven (7) was allotted to the United States.

Second. U. S. commissioner to James Dunlop and Joseph Carleton as joint tenants. Deed dated December 23rd, 1793; recorded January 23rd, 1794, in Liber B 459; conveys, among others, all of lot 7, in square 223.

Third. James Dunlop to James Carleton. Assignment dated May 24, 1803; recorded September 30th, 1812, in Liber A. D. 276; conveys all of lot 7, in square 223, among other property, all the interest of James Dunlop to Joseph Carleton.

Fourth. Will of Joseph Carleton, in Will Book No. 1, page 297, appointing Joseph Laird sole executor, with power to sell and convey both real and personal property. To the introduction of this paper-writing defendants objected on the ground that possession and claim of title had not been shown thereunder *abunde*. The court overruled the objection and admitted the will.

Fifth. James Dunlop to John Laird, executor of Joseph Carleton. Deed dated May 10th, 1816; recorded May 10th, 1816, in Liber A. L. 345. This is a deed confirming the assignment heretofore made to Joseph Carleton by Dunlop.

Sixth. John Laird, executor of Joseph Carleton, to Charles Glover. Deed in fee dated October 17th, 1817; recorded —, 1817, in Liber A. P. 62, from Laird, executor of the last will and testament of Joseph Carleton, with power to sell and convey realty; conveys all of lot 7, in square 223.

Seventh. Certain levies issued in judicials number- 270 and 271, May term, 1825, said judgments being against Charles Clover.

Eighth. T. Ringgold, U. S. marshal, to Edward Thompson. Deed dated November 12th, 1825; recorded in Liber W. B. 15, folio 185. The U. S. marshal, by virtue of two writs of *fieri facias* issued from the circuit court of the United States, county of Washington, in the District of Columbia, at the May term, 1825, upon two judgments rendered against Glover in favor of Thomas Owen and Isaac T. Longstreet on the first Monday of June, 1818, sold lot 7, in square 223, on the 20th day of May, 1825, at public auction to Edward Thompson, who was the highest bidder. To offers 7 and 8 defendant, by his counsel, objected on the ground that it was not shown that the judgments entered in 1818 were kept alive for the purposes of execution until 1825, and that therefore the levies and sale were void, and the deed from the marshal to Thompson conveyed no title.

Ninth. Edward Thompson *et al.* to William S. Nichols. Deed in trust dated July 2d, 1831; recorded December 29th, 1831, in Liber W. B. 38, folio 506. This is a deed in trust from Thompson and joined in by his assignees, which are Richard Renshaw and Peter Mackie (it appearing that Thompson made an assignment in Philadelphia to Renshaw and Mackie), the trust being to William S. Nicholls, trustee, for the purpose of selling lot 7, square 223, and out of the proceeds to pay certain debts in the District of Columbia and the balance to pay over to Renshaw and Mackie, his assignees, for the purposes of the assignment to them.

Tenth. William S. Nicholls, trustee, to William W. Corcoran. Deed dated October 7th, 1846; recorded April 16th, 1846, in Liber W. B. 121, folio 484; conveys the one undivided moiety of lot 7, in square 223.

Eleventh. William W. Corcoran to Brooke Mackall. Deed dated

March 1st, 1852; recorded September 29, 1873, in Liber 731, folio 170; deed in fee of Corcoran's interest in lot 7, square 223, being one-half of said lot, an undivided moiety.

11 Twelfth. The record in equity cause No. 1112, wherein Brooke Mackall was complainant against William S. Nicholls, to compel a conveyance of the one undivided moiety of lot 7, in square 223, the decree being in favor of the complainant and appointing a trustee to make said conveyance.

Thirteenth. Lewis Brand, trustee, to Joseph B. Hill. Deed dated September 25th, 1873; recorded September 27th, 1873, Liber 727, folio 467. Lewis Brand was appointed trustee in equity cause No. 1112 by the court, wherein Brooke Mackall, complainant, and William S. Nicholls *was* to convey one undivided moiety of lot 7, in square 223, to Brooke Mackall; the property so conveyed to Mackall; request to Joseph B. Hill in trust of Mackall, his heirs and assigns.

Fourteenth. Brooke Mackall, Sr., *et ux.* to Joseph B. Hill. Deed in trust dated April 2d; recorded September 29th, 1873, Liber 731, folio 171. This deed conveys all of lot 7, in square 223, to Hill in trust for Mackall, his heirs and assigns. The consideration and cause of this deed is that Brooke Mackall and Martha Mackall were separated, and certain other property or lot, deed in trust, to Martin F. Morris for the benefit of Martha M. Mackall.

Fifteenth. Joseph B. Hill, as trustee (for Brooke Mackall, Sr.) and in his own right, to Leonard Mackall. Deed in trust dated January 13th, 1874; recorded June 3rd, 1878, Liber 884, folio 310. This deed conveys all of lot 7, in square 223, to Leonard Mackall in trust for Brooke Mackall, Sr., and subject to his, Brooke Mackall, Sr.,
12 absolute control and disposal and only to dispose of the same as the said Brooke Mackall, Sr., may in writing direct and request.

Sixteenth. Brooke Mackall, Sr., to Brooke Mackall, Jr. Deed dated February 27th, 1880; recorded March 12th, 1880, in Liber 936, folio 252; all of lot 7, in square 223, with the request of Leonard Mackall to deed the legal title, which he, Leonard Mackall, holds by virtue of a certain deed in trust from Joseph B. Hill, trustee, dated January 13th, 1874; recorded June 3rd, 1878, in Liber 884, folio 310.

Seventeenth. The record in the case of Leonard Mackall *et al. vs.* Brooke Mackall, Jr., equity No. 8038, which was a bill filed by the heirs of Brooke Mackall, Sr., to set aside the deed made by Brooke Mackall to Brooke Mackall, Jr., recorded in Liber 936, folio 252, said suit being decided in favor of the said Brooke Mackall, Jr., and the decree reading as follows: "That the deed of Brooke Mackall, Sr., to the defendant, Brooke Mackall, Jr., of February 27th, 1880, described in the bill of complaint, was as to lot No. 7, in square 223, at the southwest corner of 14th street and New York Ave., in the city of Washington, D. C., and the interest therein described and accruing out of the same operate as a confirmation of the title, legal and equitable, in the said ground and the deed — Brooke Mackall, Jr., as to all the parties to this suit, and shall stand as a deed of conveyance for such purposes." Thereupon the plain-

13 tiff testified that Mitchell, the defendant, the tenant of the Richards heirs, was in possession of the property in suit on June 1, 1896. The plaintiff then rested.

The defendant, in order to maintain the issues joined on his part, offered the following documents and records:

1. Records in suits at law Nos. 34077, 34078, and 41016, wherein judgments were duly rendered against the defendant, and execution issued thereon.

2. Deed of Alex. Sharp, marshal, to Alfred Richards, dated October 7, 1870, recorded February 5, 1871, Liber 631, folio 14. This deed was given pursuant to a sale by the marshal under the writs of execution levied upon the property of Brooke Mackall, Jr., on the judgments referred to in No. 1. The property conveyed by said deed was described as follows:

"That part of lot numbered seven, in square numbered two hundred and twenty-three, beginning for the same at the northeast corner of said square, and running thence south forty-four (44) feet; thence westerly to the west end of said lot; thence in a northerly direction with the west line thereof to the northern line of said lot; thence with said northern line to the place of beginning."

To which said offer plaintiff objected on the ground that said deed did not describe any property whatever; said objection overruled, and exception noted.

3. Deed from D. C. to A. and T. A. Richards, dated Feb. 24, 1874; recorded March 12, 1874, Liber 747, folio 98; conveys all of said lot 7; sold for taxes for years 1867, 1868, 1869, and 1870.
14 on October 14, 1872, to grantees.

To which objection was made on the ground that said tax deed was absolutely void, there being no preliminary evidence to show the law was complied with as to publication, notice, etc.; which objection was overruled, and said deed admitted to show color of title; to which plaintiff excepted, and exception noted.

4. Deed from D. C. to same; recorded in Liber 747, folio 96; conveys same property; sold on October 14, 1872, to grantees for taxes of 1872; to which objection was made for reasons stated in No. 3. Objection overruled, and deed admitted as color of title. Exception noted.

5. Deed from T. A. Richards and wife to Alfred Richards, dated January 29, 1879; recorded same day in Liber 903, folio 419; conveys all interest of grantors to A. Richards in all of said lot 7; to which offer objection was — that said deed conveyed nothing but the tax title above noted. Objection overruled, and exception noted.

6. Quitclaim from Alfred Richards and wife to Brooke Mackall, dated Nov. 30, 1887; recorded in Liber 1291, folio 354; releases all of said lot 7, except that portion upon which the building known as Palace market stands, and save and except the triangular piece in controversy in this cause.

7. Subdivision of part of lot 7, square 223, into lot 12, [as shown in the copy following,]* filed in the office of the surveyor of the Dis-

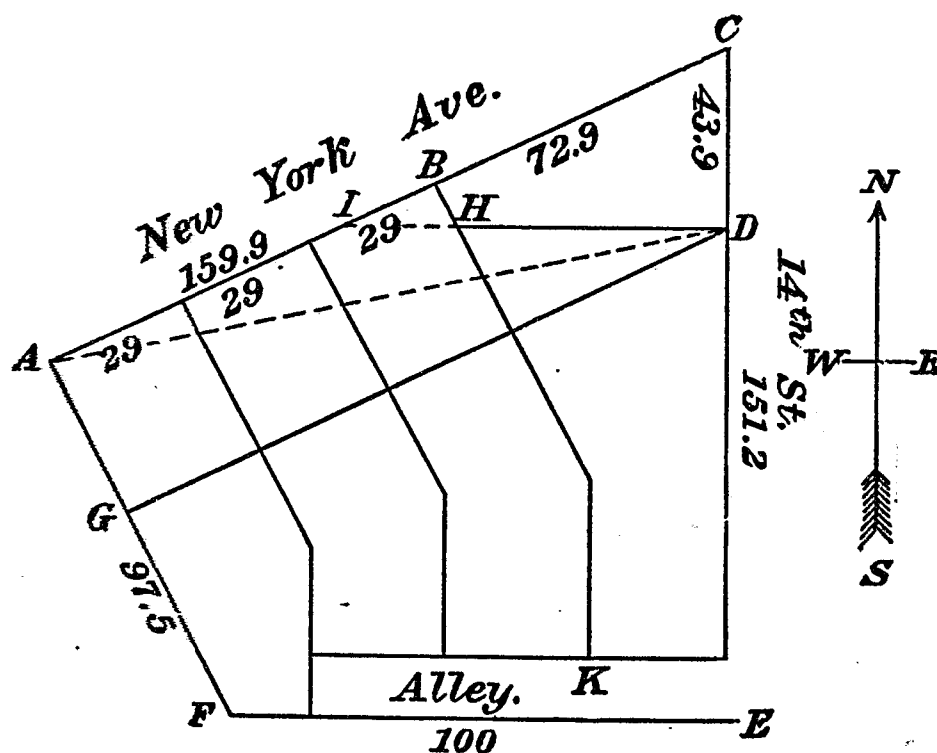
[* Words enclosed in brackets erased in copy.]

15 trict of Columbia, by Alfred Richards, November 26, 1877,
 which subdivision shows that lot 12 took in the property here
 in dispute, as shown by plat hereinafter set forth, lot 12 being
 the part comprised within the line A C D G on said plat.

8. Subdivision of part of lot 12, square 223, into lot 13, filed, by
 Alfred Richards, in the office of the surveyor of the District of
 Columbia, on March 12, 1888; which subdivision shows that lot 13
 took in property here in dispute, as shown by plat hereinafter set
 forth, lot 13 being the part comprised within the lines B C D H on
 said plat.

9. The record in equity cause No. 8118 in the supreme court of
 the District of Columbia, wherein Brooke Mackall, Jr., was com-
 plainant and Alfred Richards *et al.* defendants, in which cause the
 said Mackall, by his bill filed April 11, 1882, sought to vacate the
 aforesaid marshal's deed to Alfred and Thomas A. Richards, and
 have an accounting from the said Alfred Richards of the rents and
 profits of the part of lot 7 held by the said Richards under the said
 marshal's deed, in which said bill the said Mackall alleges, among
 other things, as follows: That on June 13, 1870, under color of cer-
 tain advertisement by the marshal of the District of Columbia sale
 was made of a portion of lot 7, square 223, to Alfred Richards, in-
 serting a diagram of the property claimed to have been so sold,
 copy following:

16



17 And stating that the lines A C E F represent the outlines
 of said lot, and the lines A C D G represent the part thereby
 claimed to have been so purchased at said sale; that a short time
 after said conveyance to Richards the said Richards took possession
 of the property so sold, and claiming it to embrace all within the
 lines running south from the southwest corner of Fourteenth street
 and New York avenue 44 feet; thence running westerly on a line
 running parallel with New York avenue to the west end of the lot;

thence northerly to New York avenue, and thence easterly along said avenue to the place of beginning, and had since held and was still holding possession of the property so taken by him, and had received the rents and profits, as shown by the following statement:

Part to Emily Peterson from July 1, 1871, to February, 1877; John O. Evans rented a part of same building from October, 1871, until February, 1873; Febry and Smith rented from May 15, 1876, to January, 1879. Mrs. Peterson and Tibbitts continue tenants.

Then charging that the alleged sale of his property by the marshal was invalid and void for certain reasons stated, and that the sale was to a judgment creditor, at a nominal sum, and praying that the sale and conveyance to Richards may be adjudged and decreed to be invalid and void; that the complainant be decreed to be the owner of said property, and that he have title and possession; that

an account be taken of rents, issues, and profits received by
18 said Richards, and the complainant have decree for any balance; that a receiver be appointed; that Leonard Mackall be decreed to convey the legal title to the complainant, and for general relief and process.

In answering said cause said Alfred Richards admitted the sale and conveyance, and that he had been in possession, as averred in said bill, but denied the equity of the bill, claimed good title under the marshal's deed, averred that in 1864 Brooke Mackall, Sr., had executed a deed of the property to the complainant, and that complainant had also a tax deed of the same, by reason of which deeds he held at the time of sale a legal title, though neither of said deeds was recorded; also claimed that the Emory and Plant judgments and executions were in pursuance of proceedings under the mechanic's lien statutes, and averred that after the marshal's sale he entered into possession of said portion of the lot so sold to him and had since continued in its possession; that there was outstanding on said portion of the lot an incomplete building upon which no work had been done for a long time, and that he had completed the said building and built a fence along the north line of said lot.

In said cause the said Mackall testified that before he started to erect the Palace Market building on lot 7, square 223, fronting on New York avenue, he subdivided lot 7 into 5 sublots, all fronting on New York avenue. The building covered two of the sublots. The subdivision was similar to the diagram of lot 7, square 223, filed with the bill of complaint, the only difference being that the subdivision by Forsyth shows five sublots instead of four.

19 In the said cause a final decree was entered dismissing the bill in accordance with the mandate of the Supreme Court of the United States and the opinion of that court, reported in 124 U. S., p. 183.

10. Then defendant offered in evidence record in equity case 2373, Alfred Richards *et al. vs.* Brooke Mackall, Jr., *et al.*, which was a judgment creditor's bill, to sell all of lot 7, except that part which was covered by the marshal's deed, as shown by a plat attached to and made part of the bill, the part of lot 7 sought to be

reached and sold being the part lying south of the line D G, as shown on the plat in No. 9, Richards claiming the part lying north of that line under the marshal's deed, the bill alleging, among other things, that Brooke Mackall, Jr., was the owner of all of lot 7, after taking out the part claimed by Richards under the marshal's deed, but that Mackall kept his title off the land records. In his answer Brooke Mackall, Jr., denied that he was the owner of lot 7 or any part thereof. The record shows that by final decree in special term, on May 1, 1873, it was adjudged that the title to "all of lot 7 in square No. 223, in the city of Washington, not heretofore sold by the marshal of the District of Columbia to the complainant, Alfred Richards, is vested in the defendant Brooke Mackall, Jr., and the same be sold," etc. The record shows that the decree was confirmed in the general term and, upon appeal to the Supreme Court, the decree of the general term was affirmed without modification and the case remanded for such proceedings as would be consistent with right and justice. The record shows that at the hearing in

20 the Supreme Court of the United States the only question in dispute was that of title in Mackall. The record shows that afterwards there was a sale by the trustees, at which they read the marshal's deed to Richards and announced that all the ground contained within that description would not be sold or attempted to be sold, but that the exact boundaries of or the exact number of feet in the piece to be sold they did not undertake to state; that whether the south line of Richards' purchase ran southwesterly from the southeast corner of the building parallel to New York avenue or whether it ran due west along the south side of the building to its rear end and thence westerly to the rear end of the lot was a legal question which they did not undertake to determine. To the sale then made Brooke Mackall, Jr., filed exceptions on the ground that the trustees made the foregoing announcement and that the property was not sold by the square foot, but for the gross sum without any information being given as to the number of square feet. On July 24, 1877, these exceptions were sustained by an order which declared that before sale could be made the amount to be sold must be definitely ascertained, and on July 13, 1878, the cause was referred to J. J. Johnson, special auditor, to report the proper metes and bounds of that portion of lot 7 which was sold by the marshal to Richards, and also that other portion of said lot not so sold. On September 19, 1879, the special auditor filed his report, in which he recited the proceedings in the suits in which the executions issued under which the sale to Rich-

ards was made, the returns of the executions; the mar-
21 shal's advertisement of the sale, the deed to Richards, and the proceedings in cause 2373. With his report he filed a plat marked Exhibit J. J. J., and stated that beginning at letter (A, the corner of New York avenue and 14th street) running south to C (on 14th St. 44 feet south of corner), and thence west to B (the west end of lot 7 on New York Ave.), would be found all the ground covered by the marshal's advertisement, and that the

marshal's deed did not conform to this description; that the ground plan of the said building offered and filed in evidence (by Brooke Mackall, Jr., and marked J. J. J. No. 1) shows that it covers only 43 feet 3 inches front; that the lines intending to show the courses and distances, in all the papers, are so irregular, indefinite, and uncertain that it was impossible to make any calculation as to the number of square feet of ground intended to be conveyed; that he had calculated the number of square feet of ground upon which the house is erected, which, as the proceedings then stood, he deemed to be the only definite and positive calculation that could be made. He inserts in full his calculation, which is a computation of the area of the figure marked "building" on Exhibit J. J. J. No. 1 (being the part lying within the lines C D H B on the plat in No. 9, except that line C D is 43' 3", instead of 43' 9"), which he divides into two triangles, the first, 43 feet 3 inches altitude and 63 feet 3 inches base, and the second, 13 feet 3 inches altitude and 75 feet 10½ inches base, yielding 1,870 square feet. He further states that as the lines in the deed then stood it was impossible for him to define the courses

22 and distances because of the indefinite and uncertain running of the lines; that the lines as therein indicated would not take in the property claimed by the complainant as having passed under the marshal's deed; that under the advertisement it was impossible, running west, to make that line join the west end of the lot; that to follow that line would be to run the line into New York avenue and some distance north of the west end of the lot, and that from the papers before him he could come to no conclusion how much ground was intended to be sold to satisfy the respective liens.

The record shows that Mackall (the plaintiff here) testified before the special auditor on September 30 and October 28, 1878, and stated, among other things, that lot 7 was subdivided into five sublots according to Exhibit J. J. J. No. 1, which he filed with his testimony; that the building was built to cover two of the sublots on New York avenue; that he didn't complete the erection of the building; believes Alfred Richards took forcible possession and completed the building; that the space on the diagram in red (marked "building" in printed copy of plat J. J. J. No. 1) shows the ground occupied by the building which he started to erect on the corner of New York avenue and 14th street; that some time after the sale by the marshal to Richards the latter or his agents broke into the building, took possession of it, and finished it; that Richards had been in possession of the building ever since and received the rents; that he made the diagram Exhibit J. J. J. No. 1, and Mr. Forsyth, the surveyor, drew for him the subdivision, carrying out his diagram, giving the metes and bounds as described by him, his being

23 only a rough sketch; that he had nearly finished the building to the third story and partly that story; that Richards only finished that story and put on the roof; that there has been no change that he knew of in the ground plan, except the cutting of a door and possibly a window, in what he terms the rear of the building.

Exceptions were filed to this report by the complainants and sustained, and the court, proceeding to determine the boundaries in accordance with the order of July 24th, 1877, "directed the trustees to sell, in accordance with the terms and provisions thereto, all that portion of lot 7 lying south of a line drawn from a point on 14th street 44 feet south of the northeast corner of said lot and running thence parallel with New York Ave. to the west line of lot 7 without passing upon the validity of the marshal's sale." A similar decree was passed in general term, accompanied by the recital that it should be construed "as not determining any of the question- as to any portion of said lot 7 lying north of said line." Appeal was then taken to the Supreme Court of the United States, and the said decree of the general term was reversed by the Supreme Court of the United States on November 24, 1884 (112 U. S., p. 369), and in accordance with the mandate of the Supreme Court of the United States a decree was entered in the supreme court of the District of Columbia authorizing the sale of all of lot 7 outside of the part upon which the building known as Palace market stands. The record further shows that the equity cause was satisfied, and that the trustees, while
 24 authorized to sell, never sold the property. The decree of the general term of May 6, 1885, made in accordance with the decision of the Supreme Court of the United States, reads as follows :

"And the said Supreme Court of the United States having by its said decree remanded the case to this court with directions to set aside the decree from which said appeal was prosecuted and to order the sale in satisfaction of complainant's demands and in such mode as may be consistent with the practice of the court and with the law, of all of lot 7 outside of that upon which the building known as the Palace market stands,"

and on July 13th, 1885, a decree was entered by said general term to sell "all of lot 7, in square No. 223, in the city of Washington, District of Columbia, outside of that upon which the building known as the Palace market stands."

11. The testimony of Brooke Mackall, Jr., before the auditor in said equity cause 2373, filed with the report of the auditor in said cause, wherein the said Mackall stated on July 2, 1886, among other things, that shortly after the marshal's sale to Richards the latter took possession and claimed to be in possession of all the property included in his subdivision of lot 7 into lot 12; that Richards took possession during the same summer; that lot 12 as subdivided by Richards contained 5,788.72 square feet; that Richards put a padlock on the gates of the New York Avenue front and his agent kept the key; that since June, 1882, he, Mackall, had been in possession of original lot 7, in square 223, excepting the building and about 50
 25 feet on the point on the main entrance at the corner of the market and 867 feet inclosed in the yard south of the building used by Mr. Richards' tenants; that Alfred Richards said to him, not a great while after the sale by the marshal, "If I can't hold this property under the marshal's deed, I intend to hold it

under my tax title." Mackall in his said testimony further said, "I want to state that the fifty feet on the point in front of the main entrance to the market *has* been used ever since Mr. Richards bought the building as his main entrance to the market."

12. The declaration filed January 10, 1889, by Brooke Mackall, Jr., against Alfred Richards in suit at law No. 29286, in the supreme court of the District of Columbia, in which he avers that said Richards was the owner of 1,831.83 square feet of said lot 7, improved by a brick building (being the part upon which the building known as the Palace market stands, excluding the triangular piece in suit), and seeking to recover from Richards a portion of the sum paid by Mackall Nov. 30, 1887, as taxes on all of lot 7 for years 1873 to 1877 and to second half of 1885 and all of 1886 and 1887.

13. The bill of complaint filed January 20, 1886, by Brooke Mackall, Jr., against Alfred Richards in equity cause No. 9782, in which Mackall sets out the alleged sale by the marshal to Richards, the proceedings in equity causes 2373 and 8118, the tax deeds to Richards, and the assessment of taxes on all of lot 7 to Richards, and among other things seeking to have the part of lot 7 then in Richards' possession sold with the remainder of lot 7 in said cause

26 2373 and praying for an injunction, and the answer of Alfred Richards in said equity cause 9782, in which he avers, among other things, that when he purchased the property at the marshal's sale there was an incomplete building upon it, which he completed in the year 1871, and that he had been continuously in possession and use of the said building, and out of the rents paid all the general taxes until the year 1885 and upon all the ground which he thought he had purchased with it, and the decree in said cause denying an injunction and vacating the restraining order previously granted therein.

14. The will of Alfred Richards, devising the property in suit as part of his general estate to trustees, and the lease from said trustees to Mitchell, the defendant, of the storeroom and cellar at the southwest corner 14th and N. Y. Ave. N. W. (the vestibule of the main entrance to said store standing upon the parcel of land in suit).

Respecting the payment of taxes on the property in dispute, it was admitted by counsel for the respective parties that no taxes were levied for the fiscal year 1871; that Alfred Richards or his representatives paid the following taxes as they became due for the years 1878 to 1884, both inclusive, and the first half of 1885 assessed upon subplot 12 in the name of Alfred Richards; the taxes for the year 1888, assessed upon part of subplot 12 (including the Palace Market building and the corner piece in suit), in the name of Alfred Richards, and the taxes thereafter and continuing to the time this suit was filed assessed upon subplot 13 in the name of Alfred Richards.

27 It was further admitted that the taxes assessed upon all of lot 7 for the years 1873, 1874, 1875, 1876, 1877, second half of 1885, 1886, and 1887 were paid by Brooke Mackall, Jr., on Nov. 30th, 1887.

To further maintain the issues on his part joined, the defendant produced one FRANK J. TIBBETTS, who testified that he rented the store floor and basement of the Palace Market building from May, 1876, until about 1891; leased it from Kennedy, Alfred Richards' agent. Richards claimed to be the owner of the property. Febrey and Smith occupied it before him. There was a double doorway at the corner ordinarily used for his store purposes for general ingress and egress. There was an awning over door extending about twenty feet out over the sidewalk—out further than the area, which he does not imagine was more than six or seven feet; made use of that corner piece as they ordinarily do; sometimes put out a fruit stand or hung out a piece of meat; this continued during his tenancy. On cross-examination he testified that he does not know that there was a cut-off from a point from 14th street to New York avenue; it was the store entrance; difficult to say whether the front was on New York avenue or 14th street; they were both fronts; at one time had his office on one street and on the other at another; he shifted the doors on New York avenue at different times to suit his convenience, but never shifted the entrance at the corner; positive about using the space in front of the door; he put goods there; that Mackall wanted to rent it to him, but he wouldn't consider it; considered he rented that from Richards with the store; never had a building or porch on this corner piece.

28 To further maintain the issues joined on his part, defendant produced one WILLIAM W. BOKMAN, who testified that he rented the store and cellar some time in 1891, and stayed there until February, 1893; rented from Alfred Richards; the corner piece was the main entrance; his business was paperhanging and decorating; there was an iron awning frame on the Fourteenth Street side and on the New York Avenue side. On cross-examination he testified that there were three doors on New York avenue; he didn't build up on the corner; the vestibule was put there afterwards, when Haller and Richards were there; thinks this vestibule didn't take it all; Hawley occupied the premises before him; Alfred Richards gave Hawley notice to quit when he went in; Hawley's business was storage; he had the big room partitioned off into rooms.

To further maintain the issues on his part joined, defendant produced one EDWARD N. RICHARDS, who testified that he took possession in February, 1894, and remained there until April, 1896; occupied the first floor and cellar; used the triangular corner piece as the main entrance during his tenancy; had only one other entrance, a rear entrance for his employees; closed up the entrances on New York avenue and put windows there; his firm put the vestibule there; it extended out over the building line on both streets; thinks it covered all the triangular piece in litigation; Mitchell, the defendant, preceded him as tenant; is son of Alfred Richards; his father died in October, 1894; the vestibule was built in 1895. On cross-examination he testified that he used the premises for a wall-paper

store ; used only two entrances, front and rear ; closed up the
29 New York Avenue entrances shortly after he took possession.

The plaintiff, in rebuttal, testified that the defendant was in possession of the triangular piece in controversy. There was a one-story building put there some time in 1895 ; the corner piece was a thoroughfare ; everybody walked there ; he had walked over it lots of times ; that Tibbetts made him an offer to rent this corner piece from him more than once. On cross-examination the plaintiff admitted that he paid the back taxes on all of lot 7 on Nov. 30, 1887, in order to obtain a loan on the part of lot 7 south and west of the Palace market.

To further maintain the issues on his part joined, the plaintiff produced one JAMES H. FORSYTH, who testified that he assisted in a survey of lot 7 ; identified a plat made at that time ; that the building occupied the part indicated in red, not embracing the triangle in controversy ; made that map some time in 1886. It was made at the request of Fisher and Co., who were the auctioneers for the trustees appointed by the court to sell the property.

The map bears date of —.

This is the substance of all the testimony in the case.

Thereupon the plaintiff moved the court to instruct the jury to return a verdict for the plaintiff on the ground that the decision of the Supreme Court of the United States in No. 2373 was *res judicata*, and that there had been no adverse possession of said property since said decree of the Supreme Court of the United States ; which said prayer

was by the court refused, and counsel for the plaintiff ex-
30 cepted ; and thereupon the said defendant asked the court to instruct the jury upon the whole of the case that the defendant was entitled to a verdict, and that — court thereupon granted said prayer ; to which granting of said prayer counsel for the plaintiff excepted.

All of which said exceptions were duly noted by the court, and are signed and sealed by the court this 23rd day of November, A. D. 1900, *nunc pro tunc*.

CHAS. C. COLE,
Asso. Justice. [SEAL.]

Supreme Court of the District of Columbia.

SATURDAY, November 17, 1900.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

The following cases were certified to Justice Cole for hearing:

Justice Cole.

BROOKE MACKALL, Plaintiff,	}	At Law. No. 40736.
<i>vs.</i>		
WILLIAM R. MITCHELL, Defendant.		

Upon motion of Mr. Baker, the time within which to file the transcript of record in the Court of Appeals be, and the same is hereby, extended to the 20th day of December, 1900, inclusive.

31 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 30, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 40736, at law, wherein Brooke Mackall is plaintiff and William Roy Mitchell is defendant, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at Seal Supreme Court, of the District of the city of Washington, this 11th day of December, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1035. Brooke Mackall, appellant, *vs.* William Roy Mitchell. Court of Appeals, District of Columbia. Filed Dec. 14, 1900. Robert Willett, clerk.

